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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

BOSTON AND MAINE CORPORATION,
Appellant,

-against-

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.,
Appellees.

On Appeal from the United States District Court for the Southern District of New York

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JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
STATUTES INVOLVED	3
QUESTIONS PRESENTED	3
STATEMENT	4
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	13
1. HAVING FOUND THE PUBLIC INTEREST WOULD BE SERVED BY THE INCLUSION OF B&M IN THE N&W SYSTEM ON A BASIS INVOLVING SUBSTANTIAL SAVINGS, THE COMMISSION ERRED IN IGNORING THOSE FINDINGS IN DETERMINING THE VALUE OF B&M	13
2. THE COMMISSION ERRONEOUSLY FAILED TO CONFORM ITS FINDINGS AS TO VALUE WITH ITS FINDINGS THAT THE INCLUSION OF B&M IN THE N&W SYSTEM IS IN THE PUBLIC INTEREST	15
3. B&M HAD NO DUTY TO INTRODUCE EVIDENCE OF THE CONTROL SAVINGS WHICH MIGHT BE REALIZED UNDER EVERY CONCEIVABLE DEGREE OR VARIATION OF CONTROL THE COMMISSION MIGHT FIND N&W WOULD EXERCISE	16
CONCLUSION	19

TABLE OF CASES AND STATUTES

Cases

Baltimore & Ohio R. Co. v. *United States*, No. 778, October Term, 1967	20

Page

Chicago, R.I. & P. Ry. v. *United States*, 284 U.S. 80 (1931) 19
Michigan Consol. Gas Co. v. *F.P.C.*, 108 U.S. App. D.C. 409, 283 F.2d 204, cert. denied, 364 U.S. 913 (1960) 19
United States v. *Pierce Auto Lines*, 327 U.S. 515 (1946) 19

Statutes

Administrative Procedure Act, 5 U.S.C.

Section 554(c) 3
Section 556(d) 3
Section 557(c) 3
Section 702 3
Section 704 3
Section 705 3
Section 706 3

Interstate Commerce Act, 49 U.S.C.

Section 5(2) 3

Judicial Code, 28 U.S.C.

Section 1253 3
Section 1336 ..... 2, 3
Section 2101(b) 3
Section 2284 ..... 2, 3
Section 2321-25 ..... 2, 3

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JURISDICTIONAL STATEMENT

Appellant Boston and Maine Corporation (B&M) appeals from the judgment of the United States District Court for the Southern District of New York, entered on October 19, 1967, dismissing this appellant's complaint which sought the reversal, in part, of an order of the Interstate Commerce Commission and a remand of the proceeding in which the Commission had entered the said order which directed the inclusion of B&M, as a subsidiary of the Norfolk and Western Railway Company (N&W), in a system to be composed of N&W, Erie-Lackawanna Railroad Company (E-L), the Delaware and Hudson Railroad Corporation (D&H), and B&M, on terms and conditions specified by the Commission. B&M submits

this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented by it.

OPINION BELOW

The opinion and judgment of the statutory three-judge court entered on October 19, 1967, in the United States District Court for the Southern District of New York is not yet reported. It will not be included in the appendix hereto since it is already before the Supreme Court as Appendix B to the jurisdictional statement of the appellant Norfolk and Western Railway Company in its appeal from the same judgment below, No. 779, October Term, 1967. A memorandum order of the court below of July 26, 1967, dealing with certain interlocutory matters is also before the Supreme Court as Appendix A to the jurisdictional statement of N&W. The Supplemental Report of the Interstate Commerce Commission, dated June 9, 1967, from which B&M appealed below, is reported at 330 I.C.C. 780, and the Commission's Report on Reconsideration dated August 10, 1967, as modified on September 1, 1967, is reported at 331 I.C.C. 22. Copies of the Commission's Reports and Orders have been lodged with the Clerk of the Supreme Court in No. 779.

JURISDICTION

The action in the court below was instituted by the Delaware and Hudson Railroad Corporation (D&H) on June 23, 1967, to suspend, enjoin and set aside in part the Commission's order of June 9, 1967, in F.D. No. 21510. On June 30, 1967, B&M sought leave to intervene as a party plaintiff in said action. Intervention of B&M was granted by order of the district court entered on July 10, 1967.

The action of B&M is brought under sections 1336, 2284, and 2321-2325 of Title 28, United States

Code, to enjoin, annul and set aside the Supplemental Order of the Interstate Commerce Commission, dated June 9, 1967, in Finance Docket No. 21510 et al., as modified by its orders dated August 10, 1967, and September 1, 1967. The judgment of the district court dismissing B&M's intervening complaint was entered on October 19, 1967. Notice of this appeal was filed in the United States District Court for the Southern District of New York on November 1, 1967. The jurisdiction of the Supreme Court to review this order by direct appeal is conferred by section 1253 of Title 28, United States Code.

STATUTES INVOLVED

The statutes involved in this case are: the Interstate Commerce Act, § 5(2), 49 U.S.C. § 5(2); the Judicial Code, 28 U.S.C. §§ 1253, 1336, 2101(b), 2284, and 2321-25; the Administrative Procedure Act, §§ 5(b), 7(c), 8(b), 10(a), (c), (d), and (e), 5 U.S.C. §§ 554(c), 556(d), 557(c), 702, 704, 705, 706. The text of those statutes is attached hereto as Appendix A.

QUESTIONS PRESENTED

1. Did the district court err in sustaining the Commission's Supplemental Report and Order of June 9, 1967, inasmuch as that order directs the inclusion of B&M in the N&W system on terms and conditions which erroneously fail to take into consideration the savings and traffic gains which the N&W system will realize as a result of B&M's inclusion therein?

2. Did the district court err in failing to remand the proceedings to the Commission for further hearing and consideration on the grounds that the Commission, despite the fact that it based its finding that B&M's inclusion in the N&W system is in the public interest upon subsidiary findings that specific efficiencies, consolidations, and sav-

ings would occur, erroneously failed to give B&M credit for those consolidations, efficiencies, and savings in determining B&M's value?

3. Alternatively, did the district court err in failing to remand the proceedings to the Commission with the direction that the Commission deny B&M's petition for inclusion in N&W on the ground that the Commission failed to prescribe terms of inclusion which were equitable to B&M and its shareholders?

STATEMENT

For more than a century and a third Boston and Maine and its predecessor railroads have engaged as common carriers by rail in interstate commerce in New England. B&M presently conducts freight operations in Maine, New Hampshire, Vermont, New York, and Massachusetts. Its passenger operations are now limited essentially to the Boston metropolitan area and are conducted under an avoidable cost contract with public authority. In prior years, B&M operated an extensive inter-city passenger service in a five-state area. Unfortunately, the toll of affording that public service long after the public ceased to utilize it was a heavy debt structure. In the words of the Presiding Officer below, "B&M has been bled white by huge passenger deficits over the past ten years." [1]

B&M enjoys a strategic geographical location. It originates or terminates the greatest part of its traffic and accordingly is in a relatively strong position to influence that traffic with respect to the choice of the carrier beyond. It is the only railroad serving many communities in its territory. It has faced the same problems which have plagued the smaller carriers on the Eastern seaboard including an imbalance in per diem charges for off-line

[1] Recommended Report and Order, F.D. No. 21510, December 22, 1966, p. 147.

cars and the high cost of being a terminating railroad in a heavily populated area without the offset of a substantial long haul. Yet B&M has survived. It has continued to render the services the Commission has on two recent occasions [2] found to be essential and necessary in the public interest, and it has avoided the bankruptcy which has befallen two of the other small, similarly-situated eastern carriers, the Central Railroad of New Jersey and the New Haven.

As a small independent line B&M realized early in the eastern rail merger movement the necessity of its inclusion in one of the large evolving merged systems. B&M applied first for inclusion in the N&W system at the time [3] when N&W was successfully seeking to merge with Nickel Plate and to lease the Wabash, and also to acquire several smaller lines. Despite N&W's assertions to the contrary,[4] inclusion in the N&W system has always been B&M's first choice. B&M's initial petition for inclusion was denied, as was that of D&H, because E-L had withdrawn its petition for inclusion in N&W. Without E-L, the lines of N&W were not contiguous with those of D&H and B&M.[5] The Commission's order denying B&M's petition was qualified, however, by Appendix "O" thereto which gave B&M, D&H, and E-L the right to petition for inclusion in N&W within five years, and provided that, if B&M inclusion in N&W were found to be in the public interest, said inclusion would be directed upon equitable terms. N&W's consummation of its merger with Nickel Plate and the concurrent lease of Wabash and acquisition of several smaller lines constituted irrevocable assent by

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[2] 330 I.C.C. 793.

[3] 324 I.C.C. 1, 30 (1964).

[4] N&W Jurisdictional Statement, Norfolk and Western R. Co. v. United States, No. 779, October Term, 1967, p. 21.

[5] 324 I.C.C. 1, 30 (1964).

N&W to including B&M on that basis, although N&W was guaranteed judicial review of any order directing B&M's inclusion.[6]

The evolving merger situation prompted B&M to petition also for inclusion in the Penn-Central system. After the Hearing Examiners ruled favorably on the Penn-Central applications, but recommended against B&M inclusion, B&M again began its earnest attempt to negotiate inclusion in N&W. Although a B&M-N&W meeting was held in the summer of 1965,[7] no progress was made for reasons which became obvious on September 1, 1965, when N&W announced the successful conclusion of highly-secret merger negotiations with C&O-B&O, and made an offer, with many conditions precedent, to include B&M (and also D&H, E-L, CNJ, and Reading) in the N&W-C&O system. The price N&W proposed for B&M was one share of N&W stock for ten shares of B&M common stock. B&M shareholders were not to receive N&W stock until they had held the stock of a holding company named "Dereco" for five years. Shortly after N&W's announcement, its chief executive officer bluntly told officials of B&M, D&H and E-L that the offer was a "take it or leave it" proposition.[8] Unfortunately, that same ten-to-one ratio was adopted by the Commission in the order here appealed from. N&W's figure substantially undervalued B&M and, as will be shown herein, the Commission committed legal error in adopting it.

B&M initiated further proceedings before the Commission on September 23, 1965, with the filing of its petition for inclusion in the N&W system pursuant to the provisions of Appendix "O." E-L and D&H filed similar

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[6] Id. at 148.

[7] B&M Opening Brief before the Commission, September 19, 1966, pp. 2-3.

[8] Ibid.

petitions shortly thereafter. B&M's brief in the court below described those proceedings in some detail.[9]

It is important to note at the outset that B&M sought *merger* with N&W.[10] Furthermore, B&M consistently argued that it would be entitled to be credited with savings and traffic gains of merger magnitude in the calculation of its worth to the N&W system, even if it should initially be included therein as a subsidiary under control, for the reason that fully-merged operations would eventually be brought about by N&W. B&M requested inclusion on the basis of an exchange of stock at the ratio of .41849 of a share of N&W common stock for each share of B&M common, and a corresponding ratio for B&M 5% convertible preferred stock.[11]

The Commission's final order directs B&M's inclusion through one hundred percent stock control of B&M as a subsidiary of N&W. Central to the error committed by the Commission is the fact that stock control can be exercised in many different ways, ranging from a relationship in which the controlled subsidiary railroad operates with virtual autonomy entirely separate from the operation of its parent to a relationship in which the parent achieves the maximum integration of the subsidiaries' operations into its own operations and those of other subsidiaries.

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[9] B&M Brief, S.D.N.Y., 67 Civ. 2451, September 5, 1967, pp. 6-11.

[10] 330 I.C.C. 783; Recommended Report and Order, December 22, 1966, F.D. No. 21510, p. 141.

[11] N&W stock closed at 92¼ on November 15, 1967. At that price, B&M's requested exchange ratio would amount to approximately $38.61 per share of B&M common. The Commission's one-for-ten ratio would amount to an evaluation of $9.23 per share for B&M common, a figure which must be discounted for the five-year delay before B&M shareholders could exchange Dereco shares for N&W shares. B&M common closed at 19 on November 15, 1967. The price quotations here are from the Wall Street Journal, November 16, 1967, p. 32.

In the expedited hearings before the Commission, the three petitioners, B&M, D&H, and E-L, all retained the services of an expert witness, William Wyer.[12] Mr. Wyer testified for B&M, D&H, and E-L on the magnitude of savings which would result from "four-way" merger of N&W, B&M, D&H, and E-L.[13] He testified in behalf of B&M on the amount of savings and traffic gains available from a two-way B&M-N&W merger,[14] and gave similar testimony for D&H. He also testified for all three petitioners with respect to traffic gains which would flow from four-way merger.[15]

Regarding the situation which would result upon N&W *stock control* of the three petitioners as subsidiaries, Mr. Wyer's role was different. He did not testify in behalf of E-L as to savings which would result from N&W control of E-L on the two-way or the four-way hypothesis.[16] In a very limited sense, he did testify for D&H and B&M with respect to the savings which would result from their control by N&W. But he did so on his expressed assumption that under a control arrangement savings would be limited to those resulting from the consolidation of the traffic solicitation forces of D&H and B&M with those of N&W.[17]

B&M's appeal arises because of the discrepancy between the explicit assumption of Mr. Wyer and the findings of the Commission as to what a control arrangement would mean. For reasons he stated, Mr. Wyer assumed that

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[12] See B&M Brief, S.D.N.Y., 67 Civ. 2451, September 5, 1967, pp. 9-11, for a more detailed explanation of Mr. Wyer's role.

[13] E-L Statement No. 7, p. 32 et seq.

[14] B&M Statement No. 7, p. 4 et seq.

[15] E-L Statement No. 7, p. 45 et seq.

[16] Id. at 42, 43. E-L's witness for this purpose was a member of its management.

[17] D&H Statement No. 3, pp. 20-23; B&M Statement No. 7, pp. 10-11, as corrected.

virtually no savings would result from control. His testimony as to merger was predicated upon the maximum integration of operations. Therefore, his testimony sets forth the two poles with regard to possible savings.

Mr. Wyer testified that B&M's allocable share of savings which would result from "four-way merger" would amount to $3,092,567 per year in net income.[18] Those savings fall into two principal categories 1) coordination of operations and equipment repair facilities including abolition of separate purchases and stores departments, and 2) reduction of administration expenses.[19] In sharp contrast, Mr. Wyer testified that he could not assume that if N&W controlled B&M any savings whatsoever could be made other than through the consolidation of the traffic solicitation forces of N&W, D&H and B&M (but not E-L) in the case of four-way control, or of N&W and B&M in the case of two-way control.[20] The total savings available through the coordination of those forces in the case of four-way control would be only $328,471.[21] Similarly, with respect to traffic gains Mr. Wyer testified that upon four-way merger, B&M would contribute an annual gain in net income of $1,722,313.[22] In contrast, the Commis-

[18] See B&M Opening Brief before the Commission, September 19, 1966, F.D. No. 21510, p. 40, for an explanation of how the figure was arrived at. This figure does not contemplate allocations of all savings to B&M. Rather, Mr. Wyer allocated savings in proportion to each railroad's contribution to them. See E-L Statement No. 7, Part III, for a description of the allocation process.

[19] E-L Exhibit No. 93, as corrected.

[20] E-L Statement No. 7, pp. 42, 43; D&H Statement No. 3, pp. 20-23; B&M Statement No. 7, pp. 10-11, as corrected.

[21] 330 I.C.C. 857. This figure gives B&M credit for all such savings, instead of merely one-half thereof as recommended by the Presiding Officer.

[22] See B&M Opening Brief before the Commission, F.D. No. 21510, September 19, 1966 p. 40, for an explanation of the derivation of that figure.

sion's Supplemental Report credited B&M with only $717,-275, a figure which the Presiding Officer at the hearings extrapolated from the petitioners' traffic studies.[23]

John P. Fishwick, Senior Vice President of N&W and its principal policy spokesman, also testified in these proceedings before the Commission, and gave a description of N&W's approach to the question of how to operate a subsidiary. He did it in testimony which related not to the inclusion of B&M, D&H, and E-L in the existing N&W, but rather to the inclusion of those three plus Reading and CNJ in the "Dereco" system as part of a merged N&W-C&O system. Nevertheless, his testimony was given in the cause below and must be regarded as depicting the policies N&W would follow as a corporate parent in control of B&M. Mr. Fishwick stated:[24]

> "The Dereco combination alone will do much to meet the problems of competition, rehabilitation and reequipping. *The five Dereco lines would be operated as a single railroad.* Unified operations would permit both coordinations of existing facilities for improved service and the creation of new facilities which cannot be justified under existing conditions.
>
> "With all five Dereco lines operated as a single entity, for example, it would be possible to eliminate the interchange delays between these lines and to coordinate their freight car distribution, thus improving car utilization and supply and making possible faster and more efficient service. The combined operations of the Dereco lines, in conjunction with N&W-C&O, would make improved communications and computer applications feasible, and provide shippers with more complete traffic data and control. These combined operations would also permit the economic

[23] Recommended Report and Order, p. 50.

[24] N&W Exhibit No. 1, p. 21.

use of modern, efficient maintenance equipment in a coordinated normalized maintenance program, and the use of efficient methods for car and locomotive repair, and maintenance." (Emphasis added.)

Long after the hearings closed on August 10, 1966, and in fact after B&M's Exceptions to the Presiding Officer's Recommended Report and Order were filed on March 1, 1967, N&W gave many more details as to what it would attempt to do with B&M as a subsidiary under the control of the N&W-C&O system. It did so when it distributed to the parties involved in the N&W-C&O proceedings the testimony of the N&W witness Clarence Jackman.[25] His testimony dealt with a larger N&W merger, but it is perfectly clear that it accurately describes the approach of N&W to the matter of integrating the operations of B&M as a subsidiary. It is drastically different from the autonomous organization premise underlying Mr. Wyer's testimony. A partial list of the efficiencies and coordinations which N&W's own witness stated would be realized by N&W as a parent in control of B&M is set forth in the margin.[26]

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[25] N&W Exhibit No. 11 in F.D. No. 23832 (N&W-C&O merger proceedings), pertinent portions of which were attached as Appendix "C" to B&M's Petition for Reconsideration before the Commission which is part of the record before this Court.

[26] 1. Centralized control of operations of all five lines (E-L, D&H, B&M, CNJ, and Reading) through a single Chief Operating Officer;
2. centralized freight car distribution and utilization;
3. a combined engineering department under one chief engineer who will bring about;

(a) better use of railroad machines;
(b) reduced inventories, etc.;

4. a single purchases and stores department;
5. all heavy locomotive repair work for the five lines performed at one facility;
6. a single accounting department;

[Footnote continued on page 12]

In its Exceptions and in its Reply to Exceptions, B&M argued to the Commission that under N&W's approach to control B&M's operations would, in form or in substance, be merged with those of N&W, and therefore B&M was entitled to credit for savings and traffic gains of merger magnitude if included in N&W through stock control.[27]

The Commission in its order of June 9, 1967, found that B&M's inclusion in N&W as a subsidiary was in the public interest. The Commission's public interest finding was bottomed on its subsidiary finding that under control significant consolidations and efficiencies, and accordingly "substantial savings" [28] would be accomplished. In other words, the Commission accepted essentially the N&W-Fishwick-Jackman approach to control and rejected that of the witness for the three petitioners, William Wyer. As the Court below conceded, "the Commission seems indeed to have believed that control savings exceed those claimed by witness Wyer. . . ." [29] Yet, it did not give B&M credit for them. Instead, it credited B&M with only those sav-

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[26] [Continued]

7. a single general claim department;
8. a single public relations department;
9. a single personnel department;
10. a single labor relations department;
11. a single real estate department;
12. a single tax department;
13. a single finance department;
14. yard coordinations;
15. coordination of computer systems; and
16. coordination of piggyback operations.

[27] Exceptions of Boston and Maine Corporation to Recommended Report and Order on Further Hearing, March 1, 1967, pp. 18-21; Reply of Boston and Maine Corporation to Exceptions to Recommended Report and Order on Further Hearing, April 1, 1967, p. 10.

[28] 330 I.C.C. 794.

[29] App. B, p. 55, to Jurisdictional Statement of N&W, No. 779, October Term, 1967.

ings obtainable through consolidation of the traffic solicitation forces of N&W, D&H, and B&M.[30]

B&M's Petition for Reconsideration was denied on August 10, 1967. The Commission's order of June 9, 1967, as modified, was upheld by the U.S. District Court for the Southern District of New York on October 19, 1967. The Court concluded that the Commission "was not bound to attempt to price these [control savings] out into increased earnings without the aid of detailed evidence and B&M had not furnished this." [31] This appeal has followed.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. Having Found The Public Interest Would Be Served By The Inclusion of B&M in The N&W System On A Basis Involving Substantial Savings, The Commission Erred In Ignoring Those Findings In Determining The Value of B&M

The Commission found that "under N&W control, petitioners will be able to achieve substantial savings." [32] To describe the derivation of those savings the Commission listed:

1. "Unified management" of what are "now several separate companies operating independently," which will in turn make possible:
2. "joint routes of affiliated lines,"
3. "the prospect of single line service,"
4. "elimination of interchanges,"
5. "more flexible distribution of equipment."

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[30] The amount credited was $328,471, 330 I.C.C. 857, as opposed to the more than $3 million obtainable upon complete integration of operations. The wide gulf between those figures had a drastic impact upon the terms for B&M inclusion.

[31] App. B, p. 55, to Jurisdictional Statement of N&W, No. 779, October Term, 1967.

[32] 330 I.C.C. 794. This finding was made under the general heading "Public Interest", id. at 784, and under the subheading, "Advantages to petitioners and to the public."

The Commission amplified its findings as to benefits available under control stating: [33]

> "Such benefits will increase the petitioners' ability to preserve and improve their present services and meet the needs of the shipping public. Through expanded piggy-back operations, petitioners will be in a better position to meet the competition of motor carriers. Because many industries prefer to locate plants where a single-line through-route service will be available, more opportunities for industrial development will be created. As part of the large N&W system, the use of more modern equipment and facilities will be justified, resulting in greater efficiency, improved operations and better service to the public."

In its ultimate findings the Commission found:

> "[I]nclusion of the petitioners in N&W will strengthen railroad competition, enhance the adequacy of the transportation service provided by N&W as well as the three petitioners by opening new routes and instituting new service, *produce the economies and efficiencies inherent in single line operation, and permit the joint use, where possible, of facilities, equipment and routes.*" [34] (Emphasis added.)

The language just quoted demonstrates that the Commission explicitly based its findings as to the public interest on subsidiary findings that the expanded N&W system would substantially integrate the operations of its component subsidiaries. In contrast there is no Commission finding that B&M inclusion in N&W would be in the public interest if only the degree of coordination described by Mr. Wyer would take place upon B&M's inclusion. Indeed, it is questionable that the Commission would have found that four autonomous components in an N&W system, functioning with entirely separate organizations,

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[33] 330 I.C.C. 795.

[34] Id. at 827.

would be able to compete against a tightly integrated and efficiently organized Penn-Central system.

2. The Commission Erroneously Failed To Conform Its Findings As To Value With Its Findings That The Inclusion of B&M In The N&W System Is In The Public Interest

The Commission failed to arrive at an evaluation of B&M which substantially corresponded to its finding as to how N&W would operate B&M. This failure was not justified by the fact that B&M had proffered a witness who had sponsored in evidence two sets of figures, one relating to the savings and traffic gains which would result from the total integration possible under merger, and the other depicting the very minimal savings which would be available if B&M should come under the control of N&W while remaining a separate, virtually autonomous, organization. If the Commission had accepted Mr. Wyer's assumptions as to the nature of the control relationship between N&W and B&M, then it would have been justified in using his figures in evaluating B&M. However, the Commission rejected Mr. Wyer's concept of control and found that identified efficiencies and consolidations—and substantial savings—would be realized by N&W. Therefore, if the Commission's findings as to the nature of control are correct, its adoption of the Wyer control savings figures is erroneous.

The opinion below reveals that the district court misunderstood the sequence of proceedings before the Commission, for it stated: [35] "However, when it became apparent that merger was not in the cards for any of the three carriers, petitioners' witness Wyer presented testimony on the savings (and traffic gains) resulting from inclusion as

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[35] Appendix B, p. 53, N&W Jurisdictional Statement, No. 779, October term, 1967.

controlled subsidiaries." The fact of the matter is that what little Wyer said concerning control in behalf of B&M was submitted as part of B&M's original testimony which was distributed in the Commission proceeding prior to the initiation of hearings.[36]

3. B&M Had No Duty To Introduce Evidence of The Control Savings Which Might Be Realized Under Every Conceivable Degree or Variation of Control The Commission Might Find N&W Would Exercise

The Court below rejected B&M's objections to the Commission's failure to make its findings as to savings consistent with its findings as to the nature of control. It based that rejection on B&M's failure to give the Commission aid in that task by supplying detailed evidence. The Court below would require of B&M a degree of prescience which the administrative process should not demand of any party. B&M could not have known whether the Commission would agree with the Wyer assumptions as to control or with the N&W-Fishwick-Jackman approach to control under the circumstances of this particular case. Furthermore, in its Exceptions and Reply to Exceptions, B&M alerted the Commission to the significance of N&W's approach to control. B&M pointed out that Mr. Fishwick's testimony in this case demonstrated that N&W's approach to control would produce benefits approximating those of full merger, and B&M accordingly asked credit for the savings of full merger if the Commission should direct control.[37]

It is unreasonable to suggest, as the district court has, that under the circumstances of the proceedings before

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[36] B&M Statement No. 7; E-L Statement No. 7; D&H Statement No. 3.

[37] Exceptions of Boston and Maine Corporation to Recommended Report and Order on Further Hearing, March 1, 1967, pp. 18-21; Reply to Exceptions of Boston and Maine Corporation to Recommended Report and Order on Further Hearing, April 1, 1967, p. 10.

the Commission, it was appropriate for B&M to come forward with detailed evidence as to the savings which would be realized under some intermediate degree of integration of operations. When the Commission took this case under consideration B&M was still seeking merger with N&W, and requesting alternatively that if a temporary period of control were directed, or if control were directed on the basis suggested by Mr. Fishwick, B&M be credited with full merger savings and traffic gains.[38]

In the Wyer testimony, the Commission had before it the two poles of predictable savings. Since it apparently rejected B&M's position that the Fishwick testimony justified giving B&M merger savings upon inclusion by control, the Commission with its expertise should have calculated the approximate value of the substantial control savings which it *found would occur*. If it felt the record was inadequate, the Commission should have asked the parties to submit more detailed evidence in view of its substantial acceptance of the N&W-Fishwick-Jackman approach to control.

It is fair to observe that in another portion of its report in these proceedings, the Commission showed great ingenuity in arriving at such estimates with respect both to the losses of traffic which the N&W might experience upon the consummation of the Penn-Central merger and the extent to which inclusion of petitioners would reduce those losses.[39]

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[38] Ibid.

[39] 330 I.C.C. 807 et seq. Starting with N&W's estimate of the extent to which it would experience losses of traffic to Penn-Central despite petitioners' inclusion, the Commission arrived at figures (which B&M does not challenge here) representing the amounts of traffic which Penn-Central would take away from N&W without inclusion of the three petitioners.

B&M does not challenge the Commission's findings that the petitioners' inclusion will save for N&W the significant amounts of traffic described in the report. B&M merely cites those findings as evidence of how the Commission was able and willing in this very proceeding to apply its expertise to the evidence before it to come up with approximate dollar figures which it used to support essential subsidiary findings. In the case of the traffic findings just referred to, it was important that the Commission make such findings in order to show the overall reasonableness of its rationale for solving the problems presented by the eastern rail mergers. It was equally important that the Commission take similar steps with regard to B&M's contribution to N&W. As N&W's Jurisdictional Statements in Nos. 778 and 779 clearly show, N&W obviously regards as an "Achilles heel" the Commission's failure to arrive at terms for inclusion of B&M which, in N&W's opinion,[40] have any prospect of being accepted by B&M shareholders. N&W obviously feels that this particular failure on the part of the Commission affords N&W with its best means of delaying further the Penn-Central merger and a resolution of the New Haven problem while N&W 1) enjoys the fruits of its already-accomplished consolidation with Nickel Plate, Wabash, and other smaller lines, and 2) attempts to push through its own super-merger with C&O-B&O. N&W would not be in a position to employ this strategy if the Commission had evaluated B&M consistently with its finding that "substantial savings" would be realized.

While the discussion here deals chiefly with the magnitude of the Commission's error with respect to savings, the same failure to take cognizance of its subsidiary find-

[40] B&M's Board of Directors has not submitted the Commission's terms of inclusion to B&M shareholders nor has it formulated any recommendations thereon. It will not take either step until a final judicial decision has been reached.

ings with regard to N&W control had a serious effect also upon the Commission's findings as to traffic gains.

In the final analysis, it is not the testimony of Mr. Wyer, or Mr. Fishwick, or Mr. Jackman, against which this Court should measure the accuracy and logic of the Commission's ultimate finding as to B&M's value. It is against the Commission's own findings, based on evidence of record, that "substantial savings" will be available through specified unifications and consolidations which it found would accompany the control it directed in the public interest. An ultimate finding of the Commission cannot stand on judicial review if it does not conform substantially to the agency's conclusions upon the subsidiary facts. *Chicago, R.I.&P. Ry.* v. *United States*, 284 U.S. 80, 96, 100 (1931). The Commission's basic or subsidiary findings must support its ultimate findings rather than conflict with them as they do in these proceedings. *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 533 (1946). See also *Michigan Consol. Gas Co.* v. *F.P.C.*, 108 U.S. App. D.C. 409, 283 F.2d 204, 218 n. 41, *cert. denied*, 364 U.S. 913 (1960), and cases cited therein.

B&M argued alternatively before the Commission and the district court that since the Commission did not agree with B&M that the record required an evaluation of B&M greater than the one-to-ten N&W-B&M stock exchange ratio assigned by the Commission, it should have denied B&M's petition for inclusion in the N&W system on the ground that terms equitable to B&M and to its shareholders could not be found on the record made before the Commission. B&M continues to urge the validity of that point upon this appeal.

CONCLUSION

B&M does not challenge or disagree with the findings of the court below with respect to the inclusion of D&H and E-L in the N&W system. Therefore, B&M urges that

this Court affirm the ruling of the court below which sustains the action of the Commission with regard to the inclusion of D&H and E-L in the N&W system; that it reverse the order of the Commission insofar as it relates to B&M; and that it remand the proceedings to the Commission for limited further hearings for the purpose of adjusting upward the Commission's findings as to the terms for B&M inclusion to make them consistent with the Commission's findings as to the type of control N&W would exercise. In the companion case of *Baltimore & Ohio R. Co.* v. *United States*, No. 778, B&M takes the position [41] that the order of the court below affirming the order of the Commission should be sustained by this Court in all respects. Therefore, the action suggested by B&M herein will not entail further delay of the Penn-Central merger and accordingly will not aggravate the situation of the New Haven.

For the reasons set forth herein, probable jurisdiction of this appeal should be noted.

Respectfully submitted,

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[41] B&M's position as to consummation of Penn-Central will be set out in detail in pleadings to be filed in No. 778.

APPENDIX A

INTERSTATE COMMERCE ACT

Section 5(2), 49 U.S.C. § 5(2).

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e)

of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the finding specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving

a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employees was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any car-

rier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

JUDICIAL CODE

28 U.S.C. § 1253.

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1336.

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

28 U.S.C. § 2101(b).

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

28 U.S.C. § 2284.

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit,

who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the

rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appear that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State.

28 U.S.C. § 2321.

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalites and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

28 U.S.C. § 2322.

All actions specified in section 2321 of this title shall be brought by or against the United States.

28 U.S.C. § 2323.

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

28 U.S.C. § 2324.

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

28 U.S.C. § 2325.

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commis-

sion shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

ADMINISTRATIVE PROCEDURE ACT

Section 5(b), 5 U.S.C. § 554(c).

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

Section 7(c), 5 U.S.C. § 556(d).

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

Section 8(b), 5 U.S.C. § 557(c).

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

Section 10(a), 5 U.S.C. § 702.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Section 10(c), 5 U.S.C. § 704.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly

required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Section 10(d), 5 U.S.C. § 705.

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

Section 10(e), 5 U.S.C. § 706.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.